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October 12, 2011

President Barack Obama
The White House

Dear President Obama:

Recently, the office of the U.S. Trade Representative (USTR) took a significant step toward ratification of the Anti-Counterfeit Trade Agreement (ACTA). Ambassador Sapiro characterized ACTA as a tool to "strengthen the legal framework for enforcement" of intellectual property rights and stated that the USTR's signage of ACTA was significant toward its "entry into force."

ACTA establishes minimum standards on a broad range of intellectual property enforcement standards to which each member of ACTA agrees to comply. Although the USTR insists that current U.S. law, and its application, conform to these standards, there are concerns that agreement may work to restrain the U.S. from changing such rules and practices. As you know, the executive branch lacks constitutional authority to enter binding international agreements on matters under Congress's plenary powers, including the Article I powers to regulate foreign commerce and protect intellectual property. Yet, through ACTA and without your clarification, the USTR looks to be claiming the authority to do just that.

The USTR long asserts authority to enter ACTA as a "sole executive agreement" with no congressional authorization or approval. In its latest explanation on this topic, the USTR stated:

ACTA is consistent with existing U.S. law and does not require the enactment of implementing legislation. The United States may therefore enter into and carry out the requirements of the Agreement under existing legal authority, just as it has done with other trade agreements.

This statement by the USTR confuses the issue by conflating two separate stages of the process required for binding the U.S. to international agreements: entry and implementation. It may be possible for the U.S. to *implement* ACTA or any other trade agreement, once validly entered, without legislation if the agreement requires no change in U.S. law. But, regardless of whether the agreement requires changes in U.S. law, a point that is contested with respect to ACTA, the executive branch lacks constitutional authority to *enter* a binding international agreement covering issues delegated by the Constitution to Congress' authority, absent congressional approval.

This crucial constitutional point has been made to the USTR and published in the public sphere by dozens of law professors, but the USTR has failed to publicly address these issues. As those professors, and the sources they rely upon, explain in great detail, there are only three constitutional mechanisms for binding the U.S. to international agreements:

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1. by invocation of the Treaty Clause of the Constitution and submitting the agreement to a two-thirds vote of the Senate, or
2. through a "congressional-executive agreement" in which the agreement is approved of beforehand or after the fact by a majority of both houses of Congress, or
3. as a "sole executive agreement" governing matters delegated by Article II of the Constitution to the sole province of the President.

ACTA appears to be none of these. Sole executive agreements can be made by the President only within the restrictive set of circumstances in which the President has independent constitutional authority. ACTA's subject matter – including foreign commerce and intellectual property – appear to me and others to relate to Article I powers of Congress, not issues lying within the President's sole constitutional authority.

Although the USTR is correct when it explains that ACTA cannot alter U.S. law without congressional action and that ACTA in no way limits Congress' authority to change U.S. law to be inconsistent with ACTA, these facts do not, by themselves, render constitutional the entry into ACTA. Mr. President, if you allow the USTR to express your assent to ACTA, then the agreement can bind the U.S. under international law even without Congress' consent, because international law, not U.S. law, determines the binding effect of international agreements. According to many international law scholars, customary international law recognizes the ability of the chief executive of a country to bind its nation to an international agreement regardless of domestic legal requirements.

I request that as a condition of the U.S. putting forward any official instrument that accepts the terms of ACTA that you formally declare that ACTA does not create any international obligations for the U.S. – that ACTA is not binding. If you are unwilling or unable to make such a clarification, it is imperative that your administration provide the Congress, and the public, with a legal rationale for why ACTA should not be considered by the Congress, and work with us to ensure that we reach a common understanding of the proper way for the U.S. to proceed with ACTA. Thank you for your attention to this important matter.

Sincerely,



Ron Wyden
United States Senator